INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	7
Conclusion	12

CITATIONS

Cases:

Baugh v. *United States*, 27 F. 2d 257, certiorari denied, 278 U.S. 639	9, 11
Boehm v. *United States*, 123 F. 2d 791, certiorari denied, 315 U. S. 800	10, 11
Colbert v. *United States*, 146 F. 2d 10	12
Edgington v. *United States*, 164 U. S. 361	8, 9, 10
Gariepy v. *United States*, 220 F. 2d 252, certiorari denied, 350 U. S. 825	11
Grace v. *United States*, 4 F. 2d 658, certiorari denied, 268 U. S. 702	9
Haffa v. *United States*, 86 F. 2d 1, certiorari denied, 281 U. S. 727	10
Hoback v. *United States*, 284 Fed. 2d 529	10
Kasper v. *United States*, 225 F. 2d 275	10, 11
Kaufman v. *United States*, 282 Fed. 776, certiorari denied, 260 U. S. 735	12
Kreiner v. *United States*, 11 F. 2d 722, certiorari denied, 271 U. S. 688	12
LeMore v. *United States*, 253 Fed. 887, certiorari denied, 248 U. S. 586	12
Marzani v. *United States*, 168 F. 2d 133, affirmed, 335 U. S. 895	12
Michelson v. *United States*, 335 U. S. 469	8
Moore v. *United States*, 254 F. 2d 213, certiorari denied, 357 U. S. 926	10, 11

Cases—Continued

	Page
Nash v. *United States*, 54 F. 2d 1006, certiorari denied, 285 U. S. 556	11
Peterson v. *United States*, 268 F. 2d 87	10
Poliafico v. *United States*, 237 F. 2d 97, certiorari denied, 352 U. S. 1025	10, 11
Scheib v. *United States*, 14 F. 2d 75, certiorari denied, 273 U. S. 701	11
Smith v. *United States*, 305 F. 2d 197, certiorari denied, 371 U. S. 890	12
Sunderland v. *United States*, 19 F. 2d 202	11
United States v. *Crosby*, 294 F. 2d 928	10
United States v. *Donnelly*, 179 F. 2d 227	10
United States v. *Kimmel*, 274 F. 2d 54	10
United States v. *Klass*, 166 F. 2d 373	10
United States v. *Kushner*, 135 F. 2d 668, certiorari denied, 320 U. S. 212	10
United States v. *Lowenthal*, 224 F. 2d 248	10
United States v. *Passero*, 290 F. 2d 238, certiorari denied, 368 U. S. 819	12
Villaroman v. *United States*, 184 F. 2d 261	11

Statute:

Internal Revenue Code of 1954, Section 7201 (26 U.S.C. 7201)	2

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 678

E. PAUL BLACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 1a-28a) is reported at 309 F. 2d 331. The district court filed no opinion.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1962. (Pet. 29a.) Rehearing was denied on November 21, 1962. (R. Vol. V, p. 32.)[1]

[1] "R." references are to the record certified to this Court, which record consists of the pleadings (Vol. I), the transcript of proceedings before the district court (Vols. II-IV), and the proceedings in the court of appeals (Vol. V).

The petition for a writ of ceriorari was filed on December 20, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly instructed the jury as to the evidence of the defendant's good reputation.

STATUTE INVOLVED

Section 7201 of the Internal Revenue Code of 1954 (26 U.S.C. 7201) provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

STATEMENT

On March 29, 1961, an indictment was returned in the Eastern District of Missouri charging petitioner, E. Paul Black, with wilfully attempting to evade and defeat a portion of his and his wife's income taxes for the years 1954, 1955 and 1956 by filing fraudulent returns in violation of Section 7201 of the Internal Revenue Code of 1954. Count One charged him with understating net income in the amount of $16,650.53 for the year 1954, and wilfully attempting to evade and defeat $6,232.70 in income

taxes. Count Two charged that he understated net income in the amount of $22,118.56 for 1955, and wilfully attempted to evade and defeat $10,526.25 in income taxes. Count Three charged that he understated net income in the amount of $5,489.62 for 1956, and wilfully attempted to evade and defeat $1,685.49 in income taxes. (R. Vol. I, pp. 1-3.)

On May 23, 1961, the government filed a bill of particulars (R. Vol. I, p. 33), in which it stated that all three counts of the indictment were based on the omission of specific items of income from, and the taking of improper deductions on, petitioner's tax returns. The omitted income consisted of gains from mutual funds, gains on sales of lots, unreported business receipts and unreported interest income. The improper deductions consisted of fictional payments for rent and equipment.

The jury found petitioner guilty on all counts. (R. Vol. I, p. 39).

Petitioner resides at Flat River, Missouri, which is located in an area known as the "lead belt" (R. Vol. IV, p. 504). During the taxable years involved herein, and for some time prior thereto, petitioner had a contract with the St. Joseph Lead Company requiring him to haul a deposit known as "chat" from mine dumps to the company's mills for reprocessing (R. Vol. II, p. 48). During the taxable years this operation was petitioner's principal occupation. To perform this contract, petitioner rented a number of trucks and employed drivers for them. He operated on a twenty-four-hour basis, divided into three shifts,

with approximately twenty to twenty-five trucks and forty to forty-five drivers operating in any twenty-four-hour period. (R. Vol. II, p. 241.)

Both the rent for the trucks and the wages paid to the drivers were based upon the amount of tonnage hauled (R. Vol. II, p. 233). The lead company maintained a daily record of the chat hauled by each truck and driver. Each week this report, known as the tonnage report, was given to one James Crites, who was employed by petitioner at his office during 1953 and the first four months of 1954. Each week Crites computed the rental due on each truck and the wages due to each driver by applying a certain figure per ton to the total given on the tonnage report for each truck and driver. The drivers received one-third of the truck rental. After computing the rentals and wages, Crites then made out a check to each truck owner for rental, and one to each driver for wages, which checks were signed by petitioner. (R. Vol. II, pp. 232-235.)

During the period that Crites was in charge of computing the rents and wages, petitioner also employed an independent accountant named Wynn Edmonds. Edmonds maintained the books showing petitioner's business operations, and Crites brought him the tonnage reports each week. Edmonds entered the amount paid each driver and truck owner opposite his name in a cash disbursement journal. The totals were then entered in the ledger, and these books, which purported to show all of petitioner's income and disbursements, formed the basis for the preparation of his tax returns. (R. Vol. II, pp. 49-51.) Dur-

ing the taxable years after Crites left petitioner's employ (April 1954 to December 31, 1956), the tonnage reports were brought directly to Edmonds' office, and the rents and wages were computed by one of his employees, Mary Ann Boyer, who then made out the checks for these expenditures for petitioner's signature (R. Vol. II, pp. 51-53).

Petitioner himself owned two or three of the trucks used in hauling chat during the taxable years involved. In the early part of 1953, he arranged with one Raymond Russell, a driver, to make it appear that Russell owned these three trucks. Thereafter Russell's name appeared as owner on the tonnage reports, rental checks were made payable to him, first by Crites and then by Mrs. Boyer, and petitioner signed the checks and delivered them to Russell. Russell endorsed each check upon receipt and returned it to petitioner. This practice continued until Russell ceased driving for petitioner in January, 1956. (R. Vol. II, pp. 245-253.) The amounts of the Russell checks were entered on the books as truck rental expenditures (R. Vol. III, p. 433-434), and they were not deposited in either of petitioner's business bank accounts, but were always cashed. These payments amounted to approximately $300 each week, and they totaled $13,944.39 in 1954, $15,579.55 in 1955, and $451.81 in 1956. (R. Vol. III, pp. 434, 437, 439.)

In May 1954, petitioner and his wife, Jewell, bought shares in two mutual funds (R. Vol. III, pp. 254-256). Thereafter they invested $300 in cash in these mutual funds each week (R. Vol. III, pp. 258-

260). The shares purchased in this manner were held in the names of Earnest P. Black and J. Irene Black, which were not the names the petitioner and his wife customarily used (R. Vol. III, p. 256). These weekly investments continued until January 1956, which was the month the rental checks to Russell ceased (R. Vol. III, p. 258).

Petitioner realized $144.11 in ordinary income from the mutual funds in 1954 and $169.03 in capital gains from the same source during that year (R. Vol. III, p. 436). In 1955 his ordinary income from the mutual funds amounted to $331.76, and his capital gains amounted to $768.82 (R. Vol. III, p. 438). The gain from the mutual funds in 1956 amounted to $952.71 in ordinary income and $966.24 in capital gains (R. Vol. III, p. 440). All this income was reinvested. Petitioner testified that he was told by Edmonds that he did not have to report it until he sold his shares or until the income was actually distributed to him. Edmonds, however, testified that he told petitioner that the income was taxable to him each year, and petitioner's wife admitted that they received a Form 1099 each year notifying them that the income was taxable. (R. Vol. II, pp. 67-68, 76-79; Vol. III, pp. 381-384; Vol. IV, pp. 604-605.)

Petitioner also had income during the years 1955 and 1956 from miscellaneous sources, including the sale of real estate and construction work. Some of this income appeared on his books and tax returns and some did not. The total understated net income shown by the government amounted to $14,230.47 in 1954, $20,192.93 in 1955, and $4,151.87 in 1956

(R. Vol. III, pp. 436-440). The total tax shown by the government to be owing by petitioner amounted to $5,134.83 in 1954, $9,447.22 in 1955, and $1,230.60 in 1956 (R. Vol. III, pp. 465-468).

ARGUMENT

Petitioner's only argument (Pet. 6-13) is that the district court erred in its charge as to the reputation evidence. At the trial petitioner offered the testimony of a state court judge, the Auxiliary Bishop of St. Louis and a newspaper editor to show that he had a good reputation in the community for honesty, veracity, truthfulness and morality (R. Vol. IV, pp. 607, 612, 614). The trial court gave the following instruction (R. Vol. IV, pp. 699-700):

> Evidence has come into this case of the previous reputation of the defendant—good reputation. If you should find to your reasonable satisfaction that the reputation of the defendant, before the arising of the facts upon which the present charge was based, was good, then you are to consider such fact, together with all the other facts and circumstances of the case, because the production of such proof goes to the matter of reasonable doubt. It is admitted for the reason that the law decrees that a man of previously good reputation is less likely to commit a crime than one of bad reputation. But if all the evidence in the case, including that which has been given on the matter of previous good reputation, convinces you of defendant's guilt beyond a reasonable doubt, then his previously good reputation cannot excuse, or mitigate, or palliate his guilt to any extent whatsoever.

Petitioner objected on the ground that the jury should have been instructed that evidence of good reputation alone can create a reasonable doubt sufficient to permit a verdict of acquittal (R. Vol. IV, p. 704).

Petitioner bases his contention on this Court's decision in *Edgington* v. *United States*, 164 U.S. 361. There the Court struck down a charge which permitted the jury to consider evidence of good reputation *only* if the other evidence itself created a reasonable doubt, saying (164 U.S. at 366):

> Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that *good character, when considered in connection with the other evidence* in the case, may generate a reasonable doubt. The *circumstances may be such* that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing. [Emphasis supplied.]

We think it clear that the Court was not declaring, as petitioner seems to contend, that a defendant who offers reputation evidence is automatically entitled to an instruction that such evidence alone may create a reasonable doubt. The Court removed all doubt on that score when it said, in *Michelson* v. *United States*, 335 U.S. 469, 476, that evidence of good reputation "alone, *in some circumstances*, may be enough

to raise a reasonable doubt of guilt and * * * in the federal courts a jury *in a proper case* should be so instructed" (emphasis supplied).

While the trial court, paraphrasing the Court's language in the *Edgington* case, correctly charged that evidence of good reputation "together with all the other facts and circumstances of the case" is to be considered in relation to the question whether a reasonable doubt exists, it concluded that this was not "a proper case" for an instruction that such evidence alone may create a reasonable doubt. The court of appeals agreed (Pet. 25(a)):

> *Under the circumstances of this case*, we are of the opinion that appellant was not entitled to the requested instruction, and that the instruction given was adequate and correct. [Emphasis supplied.]

We submit that both courts were right. The charge as given left the jury free to acquit on any reasonable doubt, however it may have been engendered; indeed, to single out reputation evidence for special treatment might well have been "to accentuate and give undue prominence" to that element, see *Baugh* v. *United States*, 27 F.2d 257, 261 (C.A. 9), certiorari denied, 278 U.S. 639; see also *Grace* v. *United States*, 4 F.2d 658, 662 (C.A. 5), certiorari denied, 268 U.S. 702. Moreover, so strong was the evidence of petitioner's guilt—much of it entirely unexplained—that "no one could honestly believe, under the circumstances, that proof of his reputation standing alone was sufficient to raise a doubt of his guilt

* * * *." *Boehm* v. *United States*, 123 F.2d 791, 812 (C.A. 8), certiorari denied, 315 U.S. 800. Cf. *United States* v. *Kushner*, 135 F.2d 668, 674 (C.A. 2), certiorari denied, 320 U.S. 212.

Petitioner contends that there is a conflict among circuits on this question. It is true, as the court below pointed out (Pet. 24(a)), that the Seventh and Tenth Circuits have read the language in the *Edgington* case quoted above to mean that, whenever reputation evidence is offered, the trial court is required to give an instruction that such evidence may alone create a reasonable doubt. *E.g.*, *United States* v. *Donnelly*, 179 F.2d 227 (C.A. 7);[2] *Petersen* v. *United States*, 268 F.2d 87, 89 (C.A. 10). We submit that neither the language nor the holding of the *Edgington* case can be made to stand for such a proposition, and eight other circuits have rejected it. *United States* v. *Lowenthal*, 224 F.2d 248, 249 (C.A. 2);[3] *United States* v. *Klass*, 166 F.2d 373, 379-380 (C.A. 3); *Hoback* v. *United States*, 284 Fed. 529, 533 (C.A. 4); *Moore* v. *United States*, 254 F.2d 213, 221 (C.A. 5), certiorari denied, 357 U.S. 926; *Poliafico* v. *United States*, 237 F.2d 97, 114 (C.A. 6), certiorari denied, 352 U.S. 1025; *Sunderland* v.

---

[2] But cf. *Haffa* v. *United States*, 36 F.2d 1, 5 (C.A. 7), certiorari denied, 281 U.S. 727.

[3] The two Second Circuit cases cited by petitioner (Pet. 11), *United States* v. *Kimmel*, 274 F.2d 54, and *United States* v. *Crosby*, 294 F.2d 928, merely hold that a court *may* instruct the jury that evidence of good character can alone create a reasonable doubt, a proposition which we do not dispute.

United States, 19 F.2d 202, 215 (C.A. 8); *Kasper* v. *United States*, 225 F.2d 275, 278 (C.A. 9); *Marzani* v. *United States*, 168 F.2d 133, 139 (C.A.D.C.), affirmed by an equally divided court, 335 U.S. 895.

We do not believe that this apparent divergence in view among the circuits warrants review by this Court. The rule of the great majority of the circuits—that, where the instruction otherwise clearly states the relationship between reputation evidence and reasonable doubt, the court need not add that such evidence alone might create a reasonable doubt—would not in any event seem to affect such fundamental rights of the accused as to call for the exercise by this Court of its supervisory authority over the federal courts. We note that, although this very divergence of view has previously been pressed upon the Court, it has uniformly declined to review decisions holding that an instruction that reputation evidence alone may create a reasonable doubt need not be given. *Moore* v. *United States*, *supra*; *Poliafico* v. *United States*, *supra*; *Gariepy* v. *United States*, 220 F.2d 252, 261 (C.A. 6), certiorari denied, 350 U.S. 825; *Boehm* v. *United States*, *supra*; *Nash* v. *United States*, 54 F.2d 1006, 1007 (C.A. 2), certiorari denied, 285 U.S. 556; *Haffa* v. *United States*, note 2, *supra*; *Baugh* v. *United States*, *supra*; *Scheib* v. *United States*, 14 F.2d 75, 79 (C.A. 7), certiorari denied, 273 U.S. 701; *Kreiner* v. *United States*, 11

---

[4] See also *Colbert* v. *United States*, 146 F.2d 10, 11 (C.A. D.C.). Cf. *Villaroman* v. *United States*, 184 F.2d 261, 263 (C.A.D.C.).

F.2d 722, 726 (C.A. 2), certiorari denied, 271 U.S. 688; *Kaufmann* v. *United States*, 282 Fed. 776, 785 (C.A. 3), certiorari denied, 260 U.S. 735; *Le More* v. *United States*, 253 Fed. 887, 894 (C.A. 5), certiorari denied, 248 U.S. 586. See also *Smith* v. *United States*, 305 F.2d 197 (C.A. 9), certiorari denied, 371 U.S. 890; *United States* v. *Passero*, 290 F.2d 238, 246 (C.A. 2), certiorari denied, 368 U.S. 819.

CONCLUSION

The decision below was clearly correct, and the case presents no issues warranting review by this Court. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

JOSEPH M. HOWARD,
BURTON BERKLEY,
Attorneys.

FEBRUARY 1963.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 673469 695